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FILED

APR 19 2010

SECRETARY, BOARD OF
OIL, GAS & MINING

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE, NATURAL RESOURCES
DEFENSE COUNCIL, and NATIONAL
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC

Intervenors,

**DIVISION'S CONSENT TO
AMENDMENT OF REQUEST FOR
AGENCY ACTION
AND
RESPONSE TO
PETITIONERS' LIST OF
GEOLOGY/HYDROLOGY ISSUES**

Docket No. 2009-019
Cause No. C/025/0005

The Division of Oil, Gas, and Mining (Division), by and through its counsel hereby submits the following Response to the Petitioners' revised Request for Agency Action as contained in its List of Geology/Hydrology Issues.

DIVISION'S CONSENT TO AMENDMENT

The Petitioners have asserted that the list of Geology/Hydrology issues attached to the Scheduling Order filed in this matter on April 7, 2010 (see attached Exhibit 1) constitute a

revision of their Petition.¹ Under Rule 15 of the Utah Rules of Civil Procedure a party may amend his pleading only by leave of the court or by written consent of the parties. The parties have been asked to consent to this list of issues as an amendment to the Request for Agency Action. (See attached emails, Exhibit 2) In order to facilitate the prompt and final resolution of this matter the Division is willing to consent to this amendment of the Request for Agency Action with the understanding that the issues as identified on the lists attached to the Scheduling Order constitute a complete statement of the issues now asserted by the Petitioners; and that the issues will not be replaced by a reconsideration of the prior alleged deficiencies which are now waived.

RESPONSE TO ISSUES

The lists of issues contain implied allegations of law and fact that require Response. Under Rule 15 URCP, the Division is required to file this Response to the lists of issues for purposes of fully admitting or denying the allegations and framing the issues to be resolved by the Board. Accordingly the Division responds to the lists of itemized issues as follows.

Response to Petitioners' List of Geology/Hydrology Issues.

1. The Division admits that the Division's cumulative hydrologic impact assessment for the Coal Hollow mine does not establish at least one material damage criterion for each water quantity or quality characteristic that the Division requires ACD to monitor during the operations

¹The list is identified as "a notice of the issues they [PETITIONERS] intend to pursue from here on out, as opposed to a motion for leave to amend the request for agency action to that end. . . . Petitioners do not intend to pursue other issues which were set forth in the request for agency action or previous pleadings. " Exhibit 1 attached.

and reclamation periods, and denies that the Utah Coal Mining and Reclamation Act (Utah Code §§ 40-10-1 to 30(2010) (“Coal Act”) or the applicable regulations, Utah Admin. Code §§ R645-100 to 402 (“Coal Rules”) require such criterion for each monitored characteristic.

In response to Issue 1 the Division further alleges as follows.

The Division is not required to establish at least one material damage criterion for each water quantity or quality characteristic that ACD is required to monitor during the operations and reclamation periods.

The Coal Hollow Mine application has identified those aspects of the proposed mining operation that have the potential to cause material damage to the hydrologic balance outside of the permit area, and established specific “indicator parameters” for low-flow discharge rates and TDS in order to address the potential for material damage to the hydrologic regime outside of the permit area.

2. The Division admits that the Divisions CHIA does not designate a Utah water quality standard for total dissolved solids (TDS) as the ‘material damage criterion’ for surface waters outside of the permit area.

As a further Response the Division alleges as follows.

While it is correct that TDS is a water quality parameter that the CHIA identifies as one that may be important to monitor in order to prevent material damage to the hydrologic balance outside of the permit area, there is no regulatory obligation that a TDS Utah water quality standard be used as the monitoring level for TDS.

The Division has examined the literature and the water quality studies of the streams in the area of the mine, and the baseline water monitoring data submitted by ACD, and has determined that pre-mining conditions include TDS levels for streams that are in excess of the

Utah water quality standard. Based on this information and the PHC determinations a higher level was selected as a monitoring parameter to prevent material damage to the TDS levels in the hydrologic balance outside of the permit area.

3. The Division denies that ACD's hydrologic monitoring plan is not legally sufficient to provide an adequate description of how the monitoring data may be used to determine the impacts of Coal Hollow mine upon the hydrologic balance [outside of the permit area].

As a further Response, the Division alleges as follows.

The hydrologic monitoring plan at chapter 7-59 of the Application provides that it "is designed to monitor groundwater and surface water resources for any potential impacts that could potentially occur as a result of mining and reclamation activities." The locations for monitoring of surface and ground water are described with the understanding that the sites and samples are to be used to accomplish this stated purpose. The monitoring requires sampling and analysis of all the necessary water quality and quantity parameters again for this stated purpose. It is inherently understood by the Division and the operator that the reason for the monitoring data to be collected is to identify water quantity or water quality conditions that may useful to quantify impacts or the lack of impacts from mining.

4. The Division denies that ACD's hydrologic monitoring plans are unlawfully incomplete because they do not have monitoring stations:

(a) for surface water on Lower Robinson Creek immediately upgradient of the permit area; and

(b) for both surface and alluvial ground water in or adjacent to Lower Robinson Creek immediately downgradient of the most downgradient discharge point from the seeps or

springs that ACD and the Division have observed between monitoring points SW-101 and SW-5.

As a further Response Division alleges as follows.

With the exception of one area of seeps, Lower Robinson Creek is an ephemeral stream channel that runs only in response to storm events and snow melt. While the water quality and quantity emanating from the seeps may be more completely characterized by water monitoring stations closer to the seeps, the flow from these area of seeps is not significant relative to the hydrologic regime for the permit and adjacent area. In additions, during mining operations the location of the seeps will be disturbed and Lower Robinson Creek will be re-routed. The monitoring locations established by ACD bracket the permit boundaries. The effect of mining and reclamation operations on the hydrologic balance can be adequately monitored and material damage prevented with the monitoring stations as located.

5. The Division denies that ACD's operating plan is unlawfully incomplete and denies that it lacks remedial measures that ACD proposes to take if monitoring data show trends toward one or more material damage criteria.

As a further Response the Division alleges as follows.

There is no requirement in the Coal Act or the Rules that the operational plan include remedial measures to be taken if monitoring data show trends toward one or more material damage criterion. This is an idea that the Petitioners' expert has suggested based on his opinion of "how" the monitoring plan is to be used to protect the hydrologic balance. It is one way. A required operational action based on the observation of a trend toward a monitored parameter is not mandated and is not included in the operational plan requirements.

The operational plan must include all of the information required by R645-301-730 through 301-738 (including the hydrologic monitoring required discussed on the prior issue and required by R645-301-731). This extensive amount of detailed information includes steps to be taken during mining to minimize the disturbance to the hydrologic balance within the permit area and to prevent material damage outside of the permit area. The required actions include compliance with the Clean Water Act and Utah water quality standards, avoidance of acid or toxic drainage, prevention of additional contributions to TDS, water treatment facilities when needed, protection and replacement of water rights, design of sedimentation ponds, control of runoff, storage of overburden and coal wastes, and much more. The plan must specifically address any potential adverse consequences identified in the PHC. R645-301-731.

The ACD operating plan specifically addresses each of the requirements of the Coal Act and Rules including the concerns that the PHC identified with specific actions to be taken in the event the operator observes problems during mining operations. The plan includes requirements to address these concerns with specific actions based on observations of the hydrologic and geologic conditions encountered during mining.

The plan is not legally deficient because it does not include a required operational action based on the observation of a “trend toward a monitored material damage” parameter.

6. The Division denies that ACD’s geologic information is unlawfully incomplete because ACD did not drill deeply enough into the strata below the coal to identify the first aquifer below the Smirl Coal seam that may be adversely impacted by mining.

As a further Response the Division alleges as follows.

The provisions of R645-301-624.200 require that samples will be collected from test borings, drill cores, or fresh unweathered, uncontaminated samples from rock outcrops down to

and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the coal seam to be mined which may be adversely impacted by mining.” This information is used to identify and avoid problems of acid mine drainage and other potential impacts to the hydrologic balance. ACD’s drilling did not continue any further than seven feet into the Dakota formation that is the formation immediately below the lowest coal seam to be mined. It was determined that drilling deeper into the Dakota would not have provided any more data on the potential of an aquifer and if it had there would have been no geologic basis for correlating the finding to other locations. The purposes of collecting the data to determine the potential for adversely affecting ground water below the coal had been satisfied.

7. ACD’s baseline hydrologic data collected during the collection period are not unlawfully incomplete for the reasons alleged; specifically:

- (a) data ACD collected for Lower Robinson Creek immediately upgradient from the permit area is sufficient to demonstrate seasonal variability at that location; and
- (b) data ACD collected during the monitoring period immediately down gradient from the most down gradient discharge point from the seeps or springs that ACD and the Division observed between monitoring points SW-101 and SW-5 are sufficient to demonstrate seasonal variation for the stream as required by the Coal Act; and
- (c) water quality data have been adequately verified by a system of reporting that satisfies the Coal Act and the chain of custody, sampling protocols and laboratory reports as submitted by the operator are considered accurate and complete to the extent required by the Coal Act and Rules.

8. The Division's determination that Sink Valley does not contain an alluvial valley floor within the permit or adjacent area is not arbitrary but is the result of the investigations and evaluations by the Division of the relevant geologic, hydrologic and vegetative information submitted by ACD and further investigations and evaluations by the Division to determine if the necessary characteristics for the finding of an AVF as defined and mandated by the Coal Act were present in the Permit or adjacent areas.

Respectfully submitted this 19 day of April, 2010



Steven F. Alder, (Bar No #0033)
Fredric J. Donaldson, (Bar No #12076)
Assistant Attorney General
Counsel for Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing CONSENT TO AMENDMENT AND RESPONSE TO LIST OF GEOLOGY/HYDROLOGY ISSUES, to be sent by electronic transmission and to be mailed by first class mail, postage prepaid, the 19th day of ~~January~~, 2010 to:
April.

Denise Dragoo
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Stephen H.M. Bloch
Tiffany Bartz
SOUTHERN UTAH WILDERNESS ALLIANCE
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EXHIBIT

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**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS & MINING and ALTON COAL DEVELOPMENT, LLC, Respondents.	SCHEDULING ORDER Docket No. 2009-005 Cause No. C/025/0005
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Pursuant to Utah Administrative Code R641-107-100 and -200 Utah Code § 63G-4-206(1)(a) the Board hereby establishes the following schedule for hearing in the above-captioned matter. This schedule was proposed by the parties in a telephonic scheduling conference held on April 6, 2010. Petitioners Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council, and National Parks Conservation Association were represented by Walton D. Morris, Jr. and Sharon Buccino. The Division of Oil, Gas & Mining was represented by Fredric J. Donaldson. Alton Coal Development LLC was represented by Bennett E. Bayer, Denise A. Dragoo, and James P. Allen. The Board was represented by Michael S. Johnson.

ORDER

Therefore, for good cause appearing, the following schedule and deadlines shall apply to the hearing for this matter:

April 14, 2010	Witness lists shall be exchanged electronically. The parties will be permitted to amend witness lists based upon the results of Petitioners' site visit.
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9:00 19~~th~~ 00

April 15, 2010	Statements of stipulated facts, if any, shall be completed for issues designated for the April Hearing.
April 15, 2010	Filing deadline for prehearing motions, both dispositive and procedural, for the April Hearing.
April 22, 2010	Exhibits will be filed with the Board and exchanged electronically. At that time, parties will identify all scientific or technical references or treatises upon which they will rely at hearing.
April 22, 2010	Filing deadline for responses to prehearing motions for the April Hearing.
April 22, 2010	Deadline for filing optional prehearing memoranda of legal issues.
April 28-30, 2010 29-30	Hearing. The Board will commence its hearing on this matter upon the conclusion of other matters docketed for its previously-scheduled April hearing date. The Board will hear all cultural resource and air quality issues, plus geology/hydrology issues 1, 2, 3, and 5 on the attached lists provided by Petitioners.
May 11, 2010	Filing deadline for cross motions for prehearing motions, both dispositive and procedural, for the May Hearing
May 18, 2010	Filing deadline for responses to prehearing motions for the May Hearing.
May 21-22, 2010	Hearing. The Board will continue its hearing, if necessary, from April 30 and will also hear geology/hydrology issues 4, 6, 7, and 8 on the attached lists provided by Petitioners.

Notwithstanding any Board rule to the contrary, at the April 28-30 and May 21-22 hearings, the order of presentation of evidence will be (1) the Division, (2) Petitioners, (3) Kane County, and (4) Alton Coal.

Except as set forth herein, the Board's rules of Practice and Procedure at Utah Administrative Code R641 and R645-300-212 shall govern the conduct of the hearing. The procedures and deadlines set forth herein may be modified by the Board upon its own motion or that of any party.

So ordered this 7 day of APRIL, 2010.

UTAH BOARD OF OIL, GAS & MINING


Douglas E. Johnson
Chairman

PETITIONERS' LIST OF GEOLOGY/HYDROLOGY ISSUES FOR HEARING

- *1. Whether the Division's cumulative hydrologic impact assessment for the Coal Hollow mine unlawfully fails to establish at least one material damage criterion for each water quantity or quality characteristic that the Division requires ACD to monitor during the operations and reclamation periods.
- *2. Whether the Division's cumulative hydrologic impact assessment for the Coal Hollow mine unlawfully fails to designate the applicable Utah water quality standard for total dissolved solids (a maximum concentration of 1,200 milligrams per liter) as the material damage criterion for surface water outside the permit area.
3. Whether ACD's hydrologic monitoring plans are unlawfully incomplete because they fail to describe how the monitoring data that ACD will collect may be used to determine the impacts of the Coal Hollow mine upon the hydrologic balance.
4. Whether ACD's hydrologic monitoring plans are unlawfully incomplete because they fail to establish monitoring stations:
 - (a) for surface water on Lower Robinson Creek immediately upgradient of the permit area; and
 - (b) for both surface and alluvial ground water in or adjacent to Lower Robinson Creek, immediately downgradient of the most downgradient discharge point from the seeps or springs that ACD and the Division have observed between monitoring points SW-101 and SW-5.
5. Whether ACD's hydrologic operating plan is unlawfully incomplete because it fails to include remedial measures that ACD proposes to take if monitoring data show trends toward one or more material damage criteria.
- *6. Whether ACD's geologic information is unlawfully incomplete because ACD failed to drill deeply enough to identify the first aquifer below the Smirl coal seam that may be adversely impacted by mining.
7. Whether ACD's baseline hydrologic data are unlawfully incomplete in one or more of the following respects:
 - (a) the data do not include even one flow rate or water quality entry during the data collection period at monitoring stations that ACD should have established on Lower Robinson Creek immediately upgradient of the permit area, and thus the data do not demonstrate seasonal variation at that location;
 - (b) the data do not include even one flow rate or water quality entry during the data collection period at a monitoring station that ACD should have established on Lower Robinson Creek immediately downgradient of the most downgradient discharge

point from the seeps or springs that ACD and the Division have observed between monitoring points SW-101 and SW-5, and thus the data do not demonstrate seasonal variation at that location; and

- (c) none of the water quality data are verified by complete laboratory reports that establish an appropriate chain of custody and identify the sampling protocols that governed collection of each water sample.

8. Whether the Division's determination that Sink Valley does not contain an alluvial valley floor is arbitrary, capricious, or otherwise inconsistent with applicable law.

PETITIONERS' LIST OF CULTURAL RESOURCE ISSUES FOR HEARING

1. Whether the Division's determination of eligibility and effect related to cultural and historic resources covered the entire permit area approved for the Coal Hollow Mine.
2. Whether the Division's determination of eligibility and effect related to cultural and historic resources covered any area outside the permit area approved for the Coal Hollow Mine.
3. Whether the Division considered a mitigation plan for any cultural or historic resources located wholly outside of the permit area.
4. Whether the Division was required to identify and address the effect of the proposed Coal Hollow Mine on the Panguitch National Historic District before approving the mine permit.

PETITIONERS' LIST OF AIR QUALITY ISSUES FOR HEARING

1. Whether the Division determined that the Fugitive Dust Control Plan for the Coal Hollow Mine met the requirements of the Division's regulations prior to approving the mine permit.
2. Whether the Division of Air Quality provided the Division of Oil, Gas and Mining an evaluation of the effectiveness of the Fugitive Dust Control Plan for the Coal Hollow Mine prior to the Division's approval of the mine permit.
3. Whether the Division of Air Quality has provided notice to the Division of Oil, Gas and Mining of receipt of a complete air permit application from ACD for the Coal Hollow Mine.
4. Whether the Division of Air Quality has provided notice to the Division of Oil, Gas and Mining of approval of an air permit for the Coal Hollow Mine.
5. Whether the Division was required to wait for the Division of Air Quality's evaluation of the Fugitive Dust Control Plan including the plan's effectiveness in addressing the quality of the night skies before approving the Coal Hollow mine permit.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing SCHEDULING ORDER for Docket No. 2009-019, Cause No. C0250005 to be mailed with postage prepaid, this 8th day of April, 2010, to the following:

Stephen H.M. Bloch
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Southern Utah Wilderness Alliance
425 East 100 South
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[Via Email]

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106 W Vine St Ste 800
Lexington KY 40507

Handwritten signature of Julie Ann Carter in cursive script.

EXHIBIT

2

From: "Walton Morris" <wmorris@charlottesville.net>
To: "Steve Alder" <stevealder@utah.gov>, "Denise Dragoo" <ddragoo@swlaw.com>...
CC: "Sharon' 'Buccino" <sbuccino@nrdc.org>, "Steve Bloch" <steve@suwa.org>...
Date: 4/12/2010 1:11 PM
Subject: RE: Proposed Fact Stipulations

Hi All:

Steve's message has reminded me that I have not heard from opposing counsel concerning my inquiry on whether Petitioners may simply file a notice of the issues they intend to pursue from here on out, as opposed to a motion for leave to amend the request for agency action to that end. I ask again that counsel consent to the simple notice I previously proposed.

In answer to Steve's question, the lists of issues we circulated were for the purpose of advising opposing counsel, and ultimately the Board, that Petitioners do not intend to pursue other issues which were set forth in the request for agency action or previous pleadings. While Petitioners recognize that litigants frequently engage in redefinition of the issues to suit their litigation strategy, one of the benefits of being a plaintiff or petitioner is that, at least in the first instance, one gets to formulate the issues that will be tried or heard. In that sense, the lists are Petitioners' articulation of the issues they intend to prosecute. Although Petitioners cannot prevent the Division or ACD from attempting to redefine the issues, Petitioners will certainly oppose such attempts vigorously.

Walt Morris

Walton D. Morris, Jr.
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-----Original Message-----

From: "Steve Alder" <stevealder@utah.gov>
To: "Walton Morris" <wmorris@charlottesville.net>, "Denise Dragoo" <ddragoo@swlaw.com>, "Jim Allen" <jpallen@swlaw.com>, "Fred Donaldson" <freddonaldson@utah.gov>
Cc: "Sharon' 'Buccino" <sbuccino@nrdc.org>, "Steve Bloch" <steve@suwa.org>, "Tiffany Bartz" <tiffany@suwa.org>
Date: Mon, Apr-12-2010 1:41 PM
Subject: RE: Proposed Fact Stipulations
Walt ,

Could you clarify for me what the Petitioners' list of issues is intended to do, and whether they are effectively modifying the Petition? My initial reading was that you had phrased the issues with your preferred statement of the law and that we; i.e., the Division would obviously disagree, and would phrase them differently.

steve

Steve Alder
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>>> "Dragoo, Denise" <ddragoo@swlaw.com> 4/12/2010 10:14 AM >>>

Walt, thanks again, we will see if we can come up with a start on the stipulated facts before Wednesday.
Ever optimistic. Denise

-----Original Message-----

From: Walton Morris [mailto:wmorris@charlottesville.net]

Sent: Monday, April 12, 2010 9:23 AM

To: Dragoo, Denise; Allen, Jim; 'Steve Alder'; 'Fred Donaldson'

Cc: 'Steve Bloch'; 'Buccino, Sharon'; Tiffany Bartz

Subject: Proposed Fact Stipulations

Good morning All:

Before I can transmit proposed stipulations of fact for the four issues we have agreed to look at, I must confer with my expert. Turns out, he won't be available to me until Wednesday.

If any of you would like to take a shot at the necessary stipulations in the meantime, please do. Otherwise, I will have something for you Wednesday.

Walt Morris

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